IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 19.7.2007

Coram:

The Honourable Mr.Justice M.JAICHANDREN

S.A.No.755 of 1994

N.Boriah .. Appellant/Plaintiff.

vs.

The Nilgiri Co-operative printing
Press by its Special Officer,
Charring Cross, Ootacamund .. Respondent/Defendant.

The Second Appeal has been filed against the judgment and decree, dated 9.7.1993, passed in A.S.No.28 of 1989, on the file of the District Judge, The Nilgiris at Ootacamund, confirming the judgment and decree, dated 3.8.1989, passed in O.S.No.54 of 1986, on the file of the District Munsif Court, The Nilgiris at Ootacamund.

For Appellant : Mr.S.K.Rakhunathan

For Respondent : Mr.S.Jayaraman

J U D G E M E N T

The Second Appeal has been filed against the judgment and decree, dated 9.7.1993, made in A.S.No.28 of 1989, on the file of the District Court, The Nilgiris, at Ootacamund, confirming the judgment and decree, dated 3.8.1989, made in O.S.No.54 of 1986, on the file of the District Munsif Court, The Nilgiris at Ootacamund.

2. The plaintiff in the suit O.S.No.54 of 1986, is the appellant in the present second appeal. The plaintiff had filed the suit before the District Munsif Court, The Nilgiris District, at Ootacamund, praying for the reliefs of declaration and permanent injunction.

3. The brief facts of the case, as stated by the plaintiff, are as follows:

The plaintiff and his brothers are the owners of the land and building in R.S.No.1752 measuring 18-3/8. The plaintiff and his brothers had purchased the said property in the year, 1966, and when they purchased the said property, there were buildings on it some of which were over one hundred years old. The plaintiff had demolished some of the existing buildings and constructed some buildings in the said property. The eastern boundary of the property is the lands in R.S.Nos.1750/1 and 1750/2.

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4. The above mentioned lands in Survey No.1750 belonged to the Government. The Government had assigned the lands in Survey No.1750/2 to the Co-operative Printing Press and in the land in Survey No.1750/1, a Petrol Bunk is in existence. On the western end of Survey Nos.1750/1 and 1750/2 and on the eastern boundary of Survey No.1752, there is a pathway about 20 feet. The plaintiff and his brothers were using the pathway to have access to their property belonging to them. The plaintiff and his brothers and their predecessor-in-interest as well as the plaintiff's tenants have been using ABCD pathway, shown in the sketch filed along with the plaint, for over 65 years. Due to the long usage of the suit pathway by the plaintiff and his brothers and their predecessor-in-interest as well as the plaintiff's tenants, the plaintiff and his men have the right by prescription to use the said pathway as well as the right of easement by necessity.

5. The plaintiff had access to his properties only through the suit pathway, as there was no alternate pathway available for the use of the plaintiff. Since the Special Officer in charge of the defendant Press is attempting to block the passage of the plaintiff, the suit had been filed.

6. In the written statement filed on behalf of the defendant, it has been stated that the plaintiff had not filed any sale deed, along with the plaint, for an extent of 45 cents in Survey No.1750/2 belonging to the defendant Press. On 31.1.1972, the Government had allotted a portion of the land to the defendant Press, as the Government was the owner of the said property and no one else was having any right in the said property.

7. The claim of the plaintiff that the pathway about 20 feet in width marked as ABCD in the sketch filed along with the plaint has been under the usage of the plaintiff for more than 65 years is false. There was no such pathway through the property belonging to the defendant. Before the year, 1966, there were no buildings at the said place and the claim of the plaintiff that he and his predecessors-in-title as well as the plaintiff's tenants have been using the said pathway is false. Therefore, the plaintiff is not entitled to any prescriptive right to use the said pathway. Since the plaintiff has access to his property from Comercial Road, there is no need for the plaintiff to use the pathway in the property belonging to the defendant. Further, the Special Officer of the defendant Press had never stated that he would block the pathway at the place marked as AB. In such circumstances, the plaintiff is not entitled to any right of easement by necessity nor for any prescriptive right.

8. Based on the rival contentions, the trial Court had framed the following issues for consideration:

"1. Whether an extent of 0.45 cents in S.No.1750/2 was assigned to the defendant?

2. Whether there has been a road or pathway of about 20 feet on the western side of the defendant's property?

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3. Whether the plaintiff has perfected title to the suit road or pathway by prescription?

4. Whether the plaintiff has made any encroachment on the Highways Road?

5. To what relief?"

9. The trial Court had noted that the plaintiff had prayed for the reliefs of declaration and permanent injunction. With regard to the passage marked as ABCD in the sketch annexed along with the plaint, the claim of the plaintiff is that he and his predecessor-in-interest, who had sold the land to the plaintiff, have been using the suit passage for nearly 65 years. However, the plaintiff had admitted that there are two other ways to reach his property one through the Coonoor Road and the other through Commercial Road.

10. It has also been stated by the plaintiff that both the alternate ways available to have access to his property are only pathways, which are not wide enough for the use of four wheel vehicles, like, Cars, lorries etc. The only way through which such vehicles could be taken to reach the plaintiff's property is through the plaint passage. Even though the plaintiff had claimed that certain rights had accrued to him by easement of necessity and by easement of prescription, the plaintiff has not proved by way of oral or documentary evidence that the plaintiff and his predecessor-in-interest have been using the suit passage for nearly 65 years as claimed by the plaintiff. Further, the plaintiff and the witnesses examined on his behalf have admitted that there are two other alternate ways to reach his property one through Coonoor Road and the other through Commercial Road.

11. The trial Court had found that the plaintiff has not proved his claim of easement by prescription by proving the necessary ingredients to claim such a right. The trial Court had found that the plaintiff could have enjoyed the use of the suit passage only for about 14 years and that by itself would not help the plaintiff to claim the right of easement by prescription. While it is possible for the plaintiff to know the existence of the suit passage only from the year, 1972, it has not been proved by the plaintiff that he and his predecessor-in-interest have been using the suit pathway for more than 20 years.

12. Further, according to the report of the Advocate Commissioner, the suit pathway is shown as an open space and there is no evidence to show that it was a pathway through which the plaintiff and his predecessor-in-interest had access to their property by means of four wheel vehicles, like Cars, Lorries etc. Hence, the trial Court had dismissed the suit filed by the plaintiff.

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13. Aggrieved by the judgment and decree of the trial Court, dated 3.8.1989, the plaintiff had filed an appeal on the file of the District Court, The Nilgiris, at Ootacamund, in A.S.No.28 of 1989.

14. The lower appellate Court had framed the following points for consideration as to whether the judgment and decree rendered by the trial Court is to be set aside and as to whether the pathway had existed in the suit property?

15. While confirming the judgment and decree of the trial Court, the lower appellate Court had found that even though the plaintiff had marked Exhibits A.13 to A.15 to prove the existence of the pathway in the suit property, the lower appellate Court could not find that the said documents had shown the existence of the suit pathway. Since there was no mention of the 20 feet width of the suit pathway in the said Exhibits marked on behalf of the plaintiff, the lower appellate Court had found that the plaintiff had not proved his claim based on which he had sought for the relief prayed for in the suit.

16. The lower appellate Court had found that the plaintiff had been examined as P.W.1. During the cross-examination, he had admitted that he had built a building on the southern side of CD portion of the ABCD pathway three years before the filing of the suit. The lower appellate Court had also found that since the plaintiff had access to his property and since the property of the plaintiff in Survey No.1752 is situated on the eastern side of the commercial Road and south of Ooty Coonoor Road and since it is adjoining the main road, there would have been no necessity for the plaintiff to use the suit pathway. In such circumstances, the lower appellate Court had confirmed the judgment and decree of the trial Court, by its judgment and decree, dated 9.7.1993, made in A.S.No.28 of 1989.

17. Being aggrieved by the judgment and decree of the lower appellate Court, dated 9.7.1993, made in A.S.No.28 of 1989, the plaintiff had filed the present second appeal in S.A.No.755 of 1994.

18. This Court had admitted the second appeal on the following substantial question of law:

> "On the facts and circumstances is not the plaintiff entitled to the decree on the basis of prescription, the appellant using the Road-way continuously for over the statutory period?"

19. On a perusal of the records available and based on the averments made on behalf of the plaintiff as well as the defendant, it is clear that the plaintiff has not proved his right of easement of necessity or easement by prescription. The plaintiff has not been in a position to show

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that the plaintiff and his predecessor-in-interest have been using the suit pathway for nearly 65 years as claimed by him. The Courts below have found that the plaintiff had alternate access to his property.

20. It was also found from the report filed by the Advocate Commissioner that there was no pathway in the suit property as claimed by the plaintiff. In such circumstances, the plaintiff has not shown sufficient reasons or cause for this Court to interfere with the findings of the Courts below.

21. For the reasons stated above, the judgment and decree of the District Munsif Court, The Nilgiris District at Ootacamund, dated 3.8.1989, made in O.S.No.54 of 1986, as confirmed by the judgment and decree of the Subordinate Court, The Nilgiris District at Ootacamund, dated 9.7.1993, made in A.S.No.28 of 1989, cannot be interfered with by this Court in the present second appeal. Hence, the second appeal stands dismissed confirming the judgment and decree of the Courts below. No costs.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

csh

To
1. The District Court, Nilgiris at Ootacamund.

2. The District Munsif, Nilgiris at Ootacamund.

3. The Record Keeper, VR Section, High Court, Madras.

+ 1 CC To Mr. S.K.Rakhunathan, Advocate SR NO.44078

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